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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 333

STRATHMORE SHIPPING CO., INC.,
Petitioner,

v.

COASTAL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Strathmore Shipping Co., Inc., the petitioner above named, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit entered in the above case on April 12, 1957, and the order of said Court entered on May 3, 1957, denying a petition for rehearing.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 8-12)* has not been reported officially but is reported unofficially at

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* References in parentheses are to pages of the printed record.

1957 A.M.C. 992. The opinion of the Court of Appeals for the Second Circuit (R. 221) is reported at 243 F. 2d 97, 1957 A.M.C. 995. The order denying the petition for rehearing is unreported.

Jurisdiction

The judgment and decree of the Court of Appeals for the Second Circuit was made and entered on April 12, 1957, (R. 223), a copy thereof is appended to this petition in the appendix at p. 26. A copy of the court's *per curiam* opinion is appended hereto at pp. 27-28. An order denying the petition for rehearing was filed on May 3, 1957, and a copy thereof is appended to this petition in the appendix at page 30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

In a suit brought by the petitioner under a charter party which required the vessel to tender for loading not before April 20, 1952, nor after April 30, 1952, [the latter date being known as the "cancellation date" since the charterer acquired the right to cancel the charter party if the vessel did not tender by 4 P.M. of that date, and the days between the two dates being generally known as the "laydays",] the petitioner alleged and offered evidence showing that the latter date was orally extended to May 10, 1952, with the understanding that all other terms and conditions of the charter party were to remain the same. The said charter party was introduced in evidence. In its decision, the District Court, in addition to numerous errors of fact, ruled as a matter of law that a further oral understanding between the charterer and the ship-

owner that the vessel was to proceed directly to the loading port under the charter party in dispute upon completion of the discharge of cargo then on board (which discharge was contemplated to take place about the 26th of April to the 1st of May, 1952, or within the layday period) constituted a "substantial change", or in the language of the case of *American Merchant Marine Insurance Co.* v. *Letton*, 9 Fed. 2d 799, cert. den. 271 U. S. 668, under which the Court made its ruling, a term "left open". The Court of Appeals, in a per curiam opinion, affirmed, indicating that there was nothing that "suggests the presence of legal error". The questions presented are:

(1) Whether the language in a charter party that a vessel "proceed with all convenient dispatch" does not require the vessel, once the layday period has commenced, to proceed directly to the loading port without unnecessary or unreasonable delay, or does not prevent the shipowner from engaging the vessel in any other service which would result in such delay.

(2) Whether a charter party containing a cancellation date is rendered null and void in the absence of a provision that, during the layday period the vessel must proceed directly from its last discharge port to the loading port under the charter, despite the presence of a clause requiring the vessel to "proceed with all convenient dispatch"; or, in line with the opinion of the District Court, whether the absence of such a provision constitutes a "term left open".

(3) Whether an oral agreement modifying the terms of a written charter party must be itself reduced to writing and signed by the parties in order to be effective.

Statement

This is a suit in admiralty by Strathmore Shipping Company, Inc., as owner of the vessel "STRATHBAY", to recover damages for the failure of Coastal Oil Company, as charterer, to supply a cargo under a charter party agreement dated March 27, 1952, as amended by an oral agreement of April 18, 1952. By the latter agreement the time within which the vessel might report to the loading port, without the charter being subject to cancellation by the charterer, was extended ten days from April 30 to May 10, 1952. The vessel in fact reported and was duly tendered on May 3, 1952, after the Charterer had sent the owner a purported "cancellation". The charterer denied making the oral agreement, and the existence of the agreement was the principal issue before the trial court.

Despite the overwhelming evidence of the existence of the agreement adduced upon the trial, the District Court handed down a decision replete with erroneous, incomplete, irrelevant, inconsistent and demonstrably inaccurate findings of fact and conclusions of law, dismissing the libel on the merits.

In the District Court's findings of fact alone, seventeen errors were pointed out to the Court of Appeals, in addition to a conclusion of law which is clearly contrary to numerous decisions of this and inferior federal courts. Nevertheless, in a *per curiam* opinion the Court of Appeals affirmed the decree appealed from. In so doing, the Court of Appeals has decided a federal question so as to conflict with the applicable decisions of this Court and has sanctioned such a departure by the District Court from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision.

The negotiations for both the original charter party and the agreement of modification were conducted by the charterer, Coastal Oil Company, through its vice-president and general manager, Mr. James Martell. Acting for Strathmore Shipping Company, Inc., owners of the vessel "STRATHBAY", was Mr. Joseph A. Winterberger, a broker at Simpson, Spence & Young, a large marine brokerage firm.

The original charter party was negotiated between Mr. Winterberger and Mr. Martell prior to, and concluded in the course of a telephone conversation on, March 27, 1952. The important terms of the said charter party, in so far as this dispute is concerned, were that delivery of the vessel was to be tendered at a United State gulf port between April 20 and April 30, 1952 (generally called the "lay days"), with April 30, 1952, being the cancelling date. With regard to the cancelling date, the charter party provided that if the vessel were not ready to load by 4:00 P.M. on that date, then the charterer would have the option of cancelling the charter party by giving the owner notice of such cancellation within 24 hours after the cancelling date; otherwise the charter party was to remain in full force and effect. The vessel's expected readiness was indicated to be about April 22. The rate of freight was based on the former United States Maritime Commission rate for a T2 type tanker, and in this instance the freight rate was such rate plus 190% thereof. (As a matter of convenience, and inasmuch as the said rate is generally referred to in the shipping market as "USMC plus 190", this method of designa-

tion will be used hereinafter in respect of references to freight rates.)

Upon reaching an agreement with Martell on March 27, 1952, Mr. Winterberger wrote a letter to the owner and the charterer, in accordance with the usual custom, setting forth the terms of the agreement, which letter is generally known as a "fixture letter". Subsequently Mr. Winterberger prepared a formal charter party, dated it March 27, 1952, and submitted it to the owner for signature. After the owner signed the charter party it was forwarded to the charterer with the usual form of covering letter stating that the charter party was enclosed, duly executed by the owner, and requesting that it be executed by the charterer. It was then executed by the charterer and returned to the broker.

Subsequently the vessel encountered some minor delays which made it apparent that she would not arrive by the date of expected readiness, and also made it possible that she might not arrive by the cancelling date, April 30, 1952. As a result, Captain John T. Vatis, President of the owner corporation, instructed Mr. Winterberger to communicate with the charterer and request an extension in the cancelling date of three days, that is to May 3, 1952, in exchange for which the owner was willing to reduce the freight rate from "USMC plus 190" to "USMC plus 170". Mr. Winterberger testified that he telephoned to Mr. Martell on April 8 and made the said request (R. 45). However, Mr. Martell did not agree to that proposal, as he felt the 20-point difference was insufficient. Thereafter, Mr. Winterberger communicated again with Mr. Martell from time to time in further efforts to obtain an extension on those terms and also kept Mr. Martell informed as to the position of the vessel (R. 46).

On April 17, however, Mr. Winterberger was instructed by the owners to make a further proposal to Mr. Martell, which he did. The proposal was that if the charterer would extend the cancelling date by 10 days, that is to May 10, 1952, owners would reduce the freight rate by 50 points, that is from USMC plus 190 to USMC plus 140 (R. 46). Mr. Martell, after giving the proposal some consideration, felt that it was worth more than a 50-point reduction. Mr. Martell then made a counter-proposal to grant the 10-day extension in consideration of a reduction of 90 points, to USMC plus 100 (R. 47). Apparently, the owners were not quite satisfied with this counter-proposal, and authorized Mr. Winterberger to propose, in reply, a reduction of the rate to USMC plus 140 if the vessel arrived at the loading port by April 30, and USMC plus 120 if she arrived by May 10 (R. 47, 103-4). At the same time the owners authorized Mr. Winterberger to use his discretion, in the event that the proposal were not acceptable, and offer to reduce the rate to a flat USMC plus 120 for the 10-day extension, regardless of whether or not the vessel tendered by April 30 (R. 48, 104). Accordingly, Mr. Winterberger telephoned Mr. Martell on April 18 and proposed the 140-120 offer. This was not accepted by Mr. Martell, but he in turn, however, made a counter-offer to reduce the rate to USMC plus 120 should the vessel arrive by April 30, and to USMC plus 100 should the vessel arrive after April 30 (R. 47, 123). At that point Mr. Winterberger decided to exercise the discretion granted to him and he countered by offering to reduce the rate from USMC plus 190 to USMC plus 120 for a straight 10-day extension. Mr. Winterberger testified that this offer was accepted by Mr. Martell (R. 48-9). It was further agreed that all of the other

terms and conditions of the original charter party were to apply to the new agreement (R. 49). The date of the acceptance and agreement was April 18, 1952 (R. 50, 104). The issue between the parties arises from the fact that Mr. Martell subsequently denied having so agreed.

After the agreement was reached, Mr. Winterberger then advised the owner thereof (R. 104), and again following the customary practice, he prepared an addendum reflecting its terms (R. 49). He forwarded the said addendum to the owner for signature, with the customary covering letter, and obtained the owner's signature accordingly (R. 50-51). When he received the addendum duly executed by the owner, he similarly forwarded it, on April 19, to the charterer for execution by the charterer, again under cover of the customary letter, reflecting a consummated agreement, requesting such execution (R. 51).

The following business day, which was Monday, April 21, Mr. Martell telephoned Mr. Winterberger and stated that he was quite disturbed as a result of having heard a rumor to the effect that the vessel had taken on an engagement for a cross-gulf voyage prior to tendering under the charter party with the respondent (R. 125). [It should be borne in mind that, as a practical matter, any such rumor must have been based on the existence of the agreement of extension since it would have been physically impossible, by Martell's own testimony, for the vessel to have made any such cross-gulf voyage and still arrive by her original cancelling date.] Martell also stated that he believed the owner had misrepresented the position of the vessel from the time of the original fixture (R. 52), claiming in effect

that on March 27, 1952, she was not in position to have made the expected readiness date of April 22 as set forth in the original charter party. Mr. Winterberger assured him that there had been no intermediate fixture (R. 53); and that the information that he, Winterberger, had given to Mr. Martell from time to time as to the vessel's position was quite accurate and showed that if it had not been for the delays, which were not the fault of the vessel, the vessel would have made the expected readiness date (R. 52-3, 125-6). At the same time Mr. Winterberger suggested to Martel that he telephone the owner directly for confirmation of the information thus given (R. 53).

Mr. Martell then telephoned the office of the libellant owner and spoke to Mr. A. T. Yatis who confirmed Mr. Winterberger's advice to Mr. Martell.

On the following day Mr. Martell again telephoned Mr. Winterberger. In this conversation Mr. Martell stated that he had not remembered that the extension to which he agreed was for as long as 10 days (R. 55), but in any event he wanted a clause in the addendum to the effect that the vessel would be obliged under the charter with the respondent to proceed directly to the loading port immediately after completion of the discharge of the cargo which she was then currently carrying. Mr. Winterberger replied that he saw no objection to such a provision but that he would request the owner's approval. He did so, and, the owner indicating that it had no objection to such a provision, Mr. Winterberger called Mr. Martell and told him that it would be permissable for Mr. Martell to add a clause of such nature as would cover the point, if he felt such a provision necessary. Later Mr. Martell's secretary

called and asked Mr. Winterberger to dictate a clause which would adequately cover the situation, which he did (R. 55-6). The clause in question provided that the vessel was to proceed immediately to Corpus Christi (which had been indicated earlier as the probable loading port, but which was subject to change to any other United States Gulf port in accordance with the charter party) upon completion of the vessel's discharge of cargo at New Orleans. Mr. Martell caused the said clause to be typed on the original addendum, which had been previously signed by Captain Vatis on behalf of the libellant and forwarded to Mr. Martell by Mr. Winterberger (R. 56, 147).

The next evidence of any communication by Mr. Martell was on April 28, when he telephoned the office of Simpson, Spence & Young, and finding Mr. Winterberger out, spoke with Mr. James Patton, and he advised him that the vessel "STRATHBAY" was still to load at Corpus Christi in Texas (R. 199). This followed the custom of giving final and definite instructions as to the selection of a loading port prior to the vessel's readiness for sailing from her last port (R.38). Mr. Patton reported this information to Captain John Vatis in the owner's office (R. 199) and the latter transmitted the said instructions by letter dated the same day, to wit: April 28, 1952, to the Master of the vessel (R. 37).

In one of numerous contradictions with the testimony of other witnesses, Mr. Martell denied having talked with Mr. Patton about this matter at any time (R. 170). Mr. Winterberger was away at the time of this conversation and did not return to his office until the afternoon of the 29th, (R. 38-9), so Mr. Martell

could not have talked to him, as he claimed (R. 128, 172).

After returning to his office late the following day, April 29, Mr. Winterberger found a memorandum of the message transmitted by Mr. Patton, and checked with the owner in respect of the vessel's position. The owner estimated the vessel's arrival as May 1 or 2 and he relayed this information to the respondent (R. 58). The records of the Sinclair Refining Company indicated that on the same date they received corresponding advices from the respondent. The said advices were confirmed in a letter from the Sinclair Refining Company to Mr. Martell, which letter was erroneously dated April 6, 1952 but obviously intended as May 6, 1952, and which was received by Mr. Martell on May 7, 1952.

The Sinclair records then indicate that on the next day, April 30, Mr. C. R. Campbell, general manager of the Wholesale Sales Department of the Sinclair Refining Company, telephoned to Mr. Martell and advised that they would be unable to load the vessel after 12:01 A.M. on Friday, May 2, that is to say, one minute after midnight of May 1. Upon receipt of that information, Mr. Martell telephoned Mr. Winterberger and advised that if the vessel did not arrive at Corpus Christi by midnight of May 1, the refinery would be on strike. Winterberger suggested to him that he try to get a cargo at Aruba to replace the cargo from Sinclair or alternatively he would try to get the Pure Oil Company to advance their lay days and accept the vessel at an earlier date (R. 59). Mr. Martell gave no reaction to these suggestions but instead, in the afternoon of that day, April 30, he consulted counsel as to his position (R. 180-181).

On the following day, May 1, Mr. Martell telephoned Mr. Winterberger and told him to advise the owner that the "STRATHBAY" charter was cancelled. Mr. Winterberger replied that Martell had an agreement with the owner, but Martell asserted that the representations of the vessel's position, on which the agreement was based, had been false. Winterberger reported this conversation to the owner, who instructed him to tell Martell that they would not accept the cancellation and to send the respondent a telegram to that effect, which he did (R. 60). The purported advice of cancellation was confirmed by letter served upon the libellant at 12:20 P.M. on May 1, 1952, by a representative of the respondent's counsel. At this time the vessel was still at New Orleans, Louisiana, from which port she did not leave until 10 o'clock that night, and from whence she proceeded to Corpus Christi to tender under the charter.

The vessel arrived at Corpus Christi in the early afternoon of May 3 and the Master sent a telegram to the respondent advising that the vessel was tendering and was ready in all respects to receive her cargo (R. 111). A further telegram of tender was sent by Messrs. Simpson, Spence & Young and received by the respondent on May 5 (R. 177). The tender of the vessel was not accepted (R. 111). Nor did the respondent ever reply to the telegram of May 1 or that of May 5. Libellant first became aware of respondent's specific denial of the existence of the agreement upon receipt of answers to requests for admissions on November 1, 1955 (R. 20, 23), some 3½ years after the dispute arose and Mr. Winterberger first became aware of this denial when so advised by libellant's counsel on the day of his deposition before trial (November 4, 1955, almost 3½ years after the dispute arose (R. 62)).

Mr. Martell was the sole witness called on behalf of the respondent. While his testimony essentially confirmed the proposals and counter-proposals as outlined above, he denied acceptance of the final offer made by libellant. It is not our intention here to burden the Court with a recitation of the numberous respects in which Mr. Martell's testimony was self-contradictory and at times outlandishly improbable. Suffice it to say that, since his testimony contradicted that of every other witness called, he was obliged to say that each of the other witnesses, even including his own assistant, was mistaken in the testimony each of them gave (Winterberger—R. 184, Patton—R. 184, Vatis—R. 184, Marron—R. 185). He also contradicted the documentary evidence of the Sinclair Refining Company, maintaining that he advised them on the April 28 (rather than on April 29, as their records indicated) that the vessel would arrive at their terminal on May 1st or 2nd (R. 172). He could hardly categorically deny all the facts contained in the business records of Sinclair. He did maintain, though, that on April 28, the same day he told Sinclair that the vessel would arrive after April 30th, he told Mr. Winterberger that if the vessel did not arrive by April 30, he would cancel the charter (R. 172).

All the factors extraneous to the critical telephone conversation, coherently bore out the testimony of libellant's witnesses and required the conclusion that the ten-day extension had been agreed upon in that telephone conversation. In order, these factors are:

1. The agreement providing for the extension was in fact drawn, signed by the libellant and forwarded to the respondent.

2. The letter under cover of which the addendum was forwarded to the respondent blandly requested, in the usual manner, that the respondent execute and return the agreement. The request was not precatory but evidenced merely normal business courtesy.

3. The respondent actually inserted into its copy of the addendum a provision preventing intermediate voyages.

4. After the extension agreement was reached, the libellant entered into a charter for a subsequent voyage providing for expected readiness on May 19, or about the time performance under this charter would be completed. Had the agreement not been made, the owner would not have left the vessel without employment between May 1 and May 19.

5. A memorandum in Mr. Martell's file detailing the progress of the vessel was in almost exact conformity with the office log from which Mr. Vatis testified he gave Mr. Martell the information which Mr. Martell denied receiving from him.

6. The respondent notified Sinclair, as late as April 29, that the vessel would call at the loading port on May 1 or 2.

7. Sinclair by letter to the respondent on May 6, confirmed this advice and indicated that the only reason the vessel could not load was because of a work stoppage.

8. On April 28, before he was advised by the Sinclair Refining Co. of the strike, but when if was quite obvious in fact, and equally obvious to Mr. Martell, that the vessel would not arrive by April 30 (the ves-

sel then being at New Orleans), Mr. Martell advised the owner that the vessel was still to load at Corpus Christi, Texas.

9. On receipt of such advice the ship owner prepared and sent a letter instructing the Master accordingly.

10. On May 1, after receiving the purported notice of cancellation, and well prior to the vessel's actual departure from New Orleans, the libellant nevertheless caused the vessel to proceed to the loading port which would obviously be strikebound at the time of the vessel's arrival.

11. A diary kept by Mr. Winterberger, though admittedly for his personal information and guidance, detailed most of the circumstances as they occurred.

Each of the above factors substantiates and corroborates the testimony on behalf of libellant. Taken together, they impellingly lead to the inevitable conclusion that the decision of the trial court was clearly erroneous and that the evidence clearly required a contrary decision.

Reasons for Granting the Writ

1. The decision below should be reviewed because it erroneously decided an important question of admiralty law contrary to the settled rule in this and inferior courts of the United States, and also contrary to the recognized practice in the shipping industry. If the said decision were left to stand, the result would be a complete disruption not only of the general understanding of the intent and meaning of the "proceed with dispatch" clauses, but also of the requirements for a valid charter party.

It was error for the Court of Appeals to affirm the action of the District Court in applying the rule of *American Merchant Maine Insurance Co.* v. *Letton*, 9 F. 2d 799, to the case at hand, for the requirement in a charter party that a vessel "proceed with all convenient dispatch" prevented the vessel from making a commitment for an intermediate voyage once lay-days had commenced under this charter party.

In item 4 of the findings of fact in his opinion (R. 10), the District Court Judge, by assuming that a specific clause was necessary in the addendum in order to require the vessel to proceed directly to its loading port under the charter in dispute after completion of discharge under the prior charter, committed an error of law. In treating with conclusions of law, that court again refers to the insertion of such a specific requirement in the addendum, as "A substantial charge * * * subsequent to the alleged oral agreement," (R. 12) and it then relies on the case of *American Merchant Marine Ins. Co.* v. *Letton, supra,* in support of that finding and its consequent conclusion and that no agreement was reached on April 18.

In the cited case, the opinion by Judge Manton holds that an informal agreement is not binding, is not in fact an agreement, unless there is agreement on the material terms; such terms may not be "left open" to be settled later.

The insertion in the addendum to which the District Court Judge referred, read as follows: "It is understood and agreed that immediately upon discharge of molasses cargo now en route to New Orleans, vessel to proceed to Sinclair Oil Company Terminal, Corpus Christi, to load under this charter."

We submit that in following the *Letton* case (the rule of which is quite valid where applicable) the District Court has wandered completely from the proper interpretation of the legal effect of the original charter party, and the legal effect of the oral agreement of April 18, 1952 as set down in the addendum prior to the insertion of the new clause by the charterer.

There was *no* term, material or otherwise, "left open" in the oral agreement contained in the "addendum" as executed by the libellant and forwarded to the respondent. That addendum incorporated by reference the provisions of the written charter party of March 27, 1952. That charter party required the vessel to proceed to the loading port "with all convenient dispatch", which provision, as a matter of law, prohibited the vessel from making an intermediate "cross-gulf voyage", because it required the vessel to proceed to the loading port without any unreasonable or intentional delays. Pertinent portions of the charter party are contained in the Appendix hereto at pp. 31-32; and the addendum containing the inserted clause is printed at page 33 of the Appendix.

In *Olsen* v. *Hunter-Benn & Co.*, 54 Fed. 530, where the charter specified the vessel should proceed "with all convenient speed", and the owner took an unreasonably long time discharging cargo under her existing employment, the charterer was excused from loading. The owner's suit to recover for the charterer's failure to do so was dismissed. *A fortiori*, if the owner actually entered into a new engagement not then existing, which would delay the vessel that much more, owner's breach would be compounded and charterer would necessarily be excused from loading.

Without considering what is regarded as fundamental in the shipping industry, it is elementary that where a vessel is required to report for loading as soon as possible within her "lay days", she cannot, once the lay days have commenced, delay her tender under a charter party by entering into a new engagement for another voyage. In the instant case, the lay days commenced on April 20, and terminated on the cancelling date (April 30 under the original charter). By the agreement of April 18, the lay days were extended until May 10, but in view of the fact that all other terms and conditions of the original charter were preserved, it is obvious that the commencement of the lay days was not changed. Moreover, in view of the further fact that as early as April 8, or by respondent's own admission, April 10, it was known to the libellant that the vessel might have difficulty making her cancelling date, the libellant at no time subsequent to acquiring such knowledge would have been justified legally in entering into any other transaction which would further delay the vessel.

In still another respect, apart from both the cancelling date and the specific requirement of dispatch, the conversations at the time of the oral agreement which set the expected time of arrival as May 3 or earlier, independently imported the requirement that the vessel might not delay for an intermediate voyage or any other avoidable cause. Scrutton, in "Charter Parties and Bills of Lading," says,

> "The words 'expected ready to load' by a certain date mean that in view of the facts known to the promisor when making his contract he honestly expects that the vessel will be ready as stated and that his expectation is based on reasonable grounds.

> The promise is broken if either he does not honestly expect, or if he has not reasonable grounds for his expectation." (Fifteenth Edition, p. 89-90.)

It is stated in Poor on "Charter Parties and Ocean Bills of Lading",

> "A misstatement of the vessel's position, even though oral and not incorporated in the charter, permits the charterer to refuse to load." (Fourth Edition, § 21, p. 58.)

If a statement of the ship's position by the owner, upon which, of course, estimates of arrival are based, is incorrect, the charterer may lawfully refuse to load even if the vessel makes her cancelling date. Poor, § 22, p. 59.

Thus in no sense was the prohibition of an intermediate voyage lacking in the oral agreement, and the specific provision on the subject, which was accepted by owners and added to the addendum in the charterer's office, was surplusage only. That the respondent should have requested it, and that libellant should have had no objection whatsoever to writing it in, did not in any way make it an added requirement of the contract; it only repeated a requirement already there.

In *Lowber* v. *Bangs*, 69 U. S. (2 Wall.) 728, this Court held that a provision in a charter party that the vessel proceed "with all possible dispatch" to the loading port, precluded the vessel from making an intermediate voyage, and the vessel having done so, the charterers were warranted in considering themselves released from the charter party.

Similarly, in *Antole* v. *Gill*, 3 Fed. 128, affd. 7 Fed. 487, it was held that a provision that the ship would "proceed without delay to Baltimore" was not com-

plied with when the vessel remained at Genoa for 31 days discharging cargo.

In the case of *Hildebrand v. Geneva Mills Co.*, 32 F. 2d 343, in which no date for sailing from the discharge port was set, the court said at page 348:

> "* * * The only duty resting upon the vessel was to proceed upon the voyage with reasonable dispatch, and the burden was upon the charterer to show the vessel's failure to perform its duty in this respect."

If the vessel was required to proceed with reasonable dispatch it could not, therefore, unreasonably delay sailing for the loading port.

In *Rosasco* v. *Pitch Pine Lumber Co.*, 138 Fed. 25, affg. 121 Fed. 437, cert. den. 198 U. S. 587, the vessel tendered before the cancelling date provided in the charter party. The court held that the vessel had thus not unreasonably delayed sailing from the discharge port and that a provision reading "vessel to sail 48 hours after orders are given" was not a requirement that the vessel leave her last discharge port 48 hours after the designation of the loading port. The court said at page 27:

> "* * * The charterer was amply secured by other provisions, found in the printed part of the charter, providing that the vessel should 'proceed with all possible dispatch from Venice to loading port.' The charterer needed no other protection than this, coupled with its right to cancel * * *."

And, as was said in *Olsen* v. *Hunter-Benn Co.*, 54 Fed. 530, at page 531:

> "* * * I consider that the stipulation that the vessel 'should, with all convenient speed, proceed,' as equivalent to a stipulation that she should pro-

> ceed without unnecessary delay. And the shipowner, by his contract, impliedly agreed that his vessel should proceed without unreasonable delay. This was a condition precedent, as well as an agreement."

While the meaning of the particular phrase here involved, "proceed with all convenient dispatch," appears never to have been passed upon by this Court, although it is printed in several standard forms of charter parties, the foregoing cases involving similar expressions all demonstrate that, by this expression, the vessel is prohibited from unnecessarily or unreasonably delaying to proceed on the voyage. This is especially true once the lay-days, the period during which delivery of the vessel was promised, have commenced.

It thus appears to have been a well settled rule of law that a provision requiring a vessel to proceed to the loading port "with all convenient dispatch" prevented the making, once lay-days had commenced, of a commitment for an intermediate voyage. To hold now that the addition of such a prohibition supplied a term not already included in the agreement, or added a term so as to alter the rights of the parties, is inconsistent with what we conceive to be that well settled rule.

2. The decision below should be reviewed because it was error to hold that the insertion in the addendum of the clause prohibiting an intermediate voyage added a necessary provision for a complete agreement and that, accordingly, in the absence of that clause the agreement between the parties was null and void.

Even assuming that, before the insertion of the clause, the libellant was not already prohibited from

engaging the vessel "STRATHBAY" for a cross-gulf voyage, and if, further, in applying the rule of the *Letton* case, *supra,* the District Court Judge assumed that the absence of the language which was added to the addendum in effect left a material term open, then such assumption by the trial court was equally erroneous. Even if we were to assume, contrary to fact, that the original charter party had not required the vessel to proceed with dispatch, it still would have been a complete and binding charter party and, as a matter of law, the agreement set down in the addendum would likewise be complete. A cross-gulf voyage would be permitted, provided it did not delay the vessel beyond the new cancelling date. Any subsequent provision to prohibit it would be a *change,* not the settling of a term left open. The testimony is clear that there was no mention by either party of any cross-gulf voyage prohibition at the time of the critical conversation of April 18, nor at any time before April 21, and consequently the clause had not even been considered prior to or at the time of the oral agreement. Therefore, there was no omission of a material term, nor of any term, material or otherwise, in the contemplation of the parties at the time the agreement was reached. Rather, all of the terms intended to be agreed upon by the parties on April 18th, were in fact agreed upon, and consequently such agreement was immediately valid and binding. One need not go outside the *Letton* case, *supra,* for authority on this point. There, at page 801, Judge Manton stated:

> "All the terms which the parties *intend* to *include* in the formal agreement must be shown to have been agreed upon, to constitute a meeting of the minds of the parties to make the contract enforceable." (Emphasis supplied)

Since it is clear that there was no discussion before April 21st of the insertion of the clause prohibiting an intermediate voyage, it cannot have been one of the terms which the parties intended to include on April 18th. An agreement thereafter to add the additional term did not, therefore, render their prior agreement a nullity.

3. The decision of the court below should be reviewed because it erroneously holds that an admiralty contract is void unless it is reduced to a writing signed by both parties to be charged.

Even assuming, contrary to the basic law, that the original charter party had not prohibited an intermediate voyage, and further assuming that omission of reference to that subject somehow made incomplete an agreement otherwise complete, the lower courts were in error in applying the *Letton* case, *supra*; for the testimony is clear that the term was subsequently agreed upon by both parties. The charterer requested the term and the owners readily agreed to it, and the charterer was advised to insert it in the addendum if it was felt necessary. The charterer did in fact cause its insertion in the addendum. The addendum was, of course, already signed by the owner, and to hold that the charterer's failure to sign a writing evidencing an existing maritime contract makes that contract a nullity, is clear error.

As was said in *Northern Star S.S. co.* v. *Kansas Milling Co.*, 75 F. Supp. 534:

> "The fact that a contract is not in writing does not bar a suit thereon in admiralty. *American-Hawaiian S.S. Co.* v. *Willfuehr*, 274 Fed. 214, aff'd. sub. now *U. S. F. & G. Co.* v. *American-Hawaiian S.S. Co.*, 280 Fed. 1023."

The validity of this rule can hardly be questioned. See *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 39 S. Ct. 112, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438.

It is thus evident that on whatever premise the court below approved the application of the principles of the *Letton* case, *supra*, to the case at bar, it was in error.

4. The questions presented in this case are of great and recurring significance to the shipping industry and to the admiralty bar. Charter parties are customarily negotiated by brokers for the respective parties and concluded orally, often when the parties are separated by great distances. Performance under charter parties is often commenced, and even completed at times, before the charter parties have been executed and delivered by the parties thereto. To deny the effectiveness of such agreements until they have been reduced to a signed agreement, or even to cast doubt on their validity during the intervening period, would have dire and far-reaching effect upon the industry.

So, too, the requirement in a charter party that a vessel "proceed with all convenient dispatch" has long been held to have settled the rights of the parties. It is a term of art the effect of which certainly is accepted to be the prohibition against the vessel's making an intermediate fixture, once lay-days have commenced.

As previously indicated seventeen errors in the District Court's findings of fact, any one of which would prejudice petitioner's rights, were pointed out to the Court of Appeals. Taken together, they warrant an exercise of this Court's power of review. In addi-

tion, when those errors are coupled with the error of law here pointed out, this Court should grant a writ of certiorari.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN R. SHENEMAN,
Proctor for Petitioner,
Office & P.O. Address:
52 Broadway,
New York, New York.

JOSEPH CARDILLO, JR.,
Of Counsel

APPENDIX

Judgment and Decree of the Court of Appeals

(Record, page 223)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of April one thousand nine hundred and fifty-seven.

Present:

HON. CARROLL C. HINCKS,
HON. POTTER STEWART,
HON. J. EDWARD LUMBARD,
Circuit Judges.

STRATHMORE SHIPPING COMPANY,
Libellant-Appellant

v.

COASTAL OIL COMPANY,
Respondent-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

Opinion of Court of Appeals Affirming District Court Decree

(R. 221)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term 1956.

(Argued March 11, 1957 Decided April 12, 1957.)

Docket No. 24282

STRATHMORE SHIPPING COMPANY, INC.,

Libellant-Appellant,

v.

COASTAL OIL COMPANY,

Respondent-Appellee.

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

The libellant appeals from a decree in admiralty of the United States District Court for the Southern District of New York, Cashin, J., dismissing on the merits its libel for breach of a charter-party. *Affirmed.*

JOSEPH CARDILLO, JR., of Cardillo & Smith, New York, N. Y. (Charles H. Bridge, Jr., on the brief), *for libellant-appellant.*

EUGENE UNDERWOOD, of Burlingham, Hupper & Kennedy, New York, N. Y. (Hervey C. Allen, on the brief), *for respondent-appellee.*

PER CURIAM:

Because the libellant tendered the tank ship Strathbay later than the date provided therefor in its written charter to the respondent, the respondent had canceled the charter by notice according to its terms. The libellant, not disputing that this ordinarily would end all obligations on the part of the respondent, claims that the charter had been orally extended with the result that the ship was tendered on time.

The trial before Judge Cashin was solely concerned with the question whether the parties had agreed to the oral extension. The evidence was conflicting. The burden of proof was on the libellant.

The proofs were left in such posture that Judge Cashin's findings must be upheld as not clearly erroneous. *Fodera* v. *Booth American Shipping Corp.*, 2 Cir., 159 F. 2d 795; *McAllister* v. *United States*, 348 U. S. 19, 20. And we find nothing in his discussion of the conclusion reached, and nothing in the record, that suggests the presence of legal error.

Affirmed.

Per Curiam Opinion Denying Petition for Rehearing

(Record, page 232)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

STRATHMORE SHIPPING CO., INC.,
Libellant-Appellant

v.

COASTAL OIL CO.,
Respondent-Appellee

Before

HINCKS, STEWART and LUMBARD, *Circuit Judges*.

On Petition for Rehearing

JOSEPH CARDILLO, JR., of Cardillo & Smith, New York, N. Y., for *libellant-appellant*

PER CURIAM

Petition for rehearing denied.

CCH
PS
JEL
U. S. C. J. J.

Order Denying Petition for Rehearing

(Record, page 234)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of May, one thousand nine hundred and fifty-seven.

Present:

HON. CARROLL C. HINCKS,
HON. POTTER STEWART,
HON. J. EDWARD LUMBARD,
Circuit Judges.

STRATHMORE SHIPPING CO., INC.,
Libellant-Appellant

v.

COASTAL OIL CO.,
Respondent-Appellee

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Excerpts from Charter Party

(Libellant's Exhibit 1
in court below)

PREAMBLE

CHARTER PARTY made as of March 27, 1952, at New York, New York, by and between STRATHMORE SHIPPING COMPANY, INC. Owner (hereinafter called the "Owner") of the good American SS "STRATHBAY" (hereinafter called the "Vessel") and COASTAL OIL COMPANY, Charterer (hereinafter called the "Charterer").

The Vessel shall proceed with all convenient dispatch to the port or ports of loading, or so near thereto as she may safely get, always afloat, and there receive from the Charterer or supplier the cargo described in Part I, and being so loaded shall forthwith proceed as ordered on signing bills of lading to the port or ports of discharge, or so near thereto as she may safely get always afloat; and there discharge the cargo; all subject to the terms, provisions, exemptions, and limitations contained or incorporated in this Charter Party, which shall include the foregoing preamble and Parts I and II.

CLAUSE 3

Readiness and Cancellation Date

Laytime shall not commence before the readiness date named in Part I, unless otherwise provided in this Charter, or unless the Charterer accepts a notice of readiness or orders or permits the Vessel to berth before that date, or otherwise waives the provisions of this paragraph. If the Vessel is not ready to load by 4:00 p.m. (local time) on the cancelling date named in Part I, the Charterer shall have the option of cancelling this Charter by giving the Owner notice of such cancellation within twenty-four (24) hours after the cancelling date; otherwise this Charter shall remain in full force and effect. The Charterer may in its notice of cancellation specify that it will nevertheless accept the Vessel if she is ready to load on or before a date or time that Charterer may designate in such notice in which event the Owner may at its option either treat this Charter Party as cancelled or tender the Vessel on or before the date named by the Charterer in its notice, whereupon this Charter shall remain in full force and effect.

Addendum to Charter Party

(Respondent's Exhibit "A" in court below)

ADDENDUM NO. 1

April 18, 1952.

Referring to Charter Party dated March 27, 1952, between Strathmore Shipping Company, Inc., Owners of the American S/S "STRATHBAY", and Coastal Oil Company, Charterers, it is hereby understood and agreed:

THAT: In consideration for extending the cancelling date from April 30th to May 10th, 1952, the rate for freight, demurrage and extras shall be reduced from Former U.S.M.C. T-2 Rate plus 190 centum to Former U.S.M.C. T-2 Rate plus 120 centum. It is understood and agreed that immediately upon discharge of molasses cargo now en route to New Orleans, vessel to proceed to Sinclair Oil Company Terminal, Corpus Christi, to load under this charter.

All other terms conditions and exceptions to Charter Party to remain unaltered.

Signed in duplicate.

STRATHMORE SHIPPING COMPANY, INC.
Owners of the Amer. S/S "STRATHBAY".

Witness the signature of:
John T. Vatis

/s/ A. T. Vatis

/s/ John T. Vatis

By .....

Witness the signature of: COASTAL OIL COMPANY

.....

By .....